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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 575

ISRAEL A. ABRAMS, ET AL., BERNARD SHULMAN AND MEYER ABRAMS,

Petitioners,

vs.

HENRY A. SCANDRETT, WALTER J. CUMMINGS AND GEORGE I. HAIGHT, TRUSTEES OF THE PROPERTY OF CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

A. N. WHITLOCK,
Counsel for Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Respondents,
888 Union Station,
Chicago 6, Illinois.

January 18, 1944.

THE BUNTHORP-WARREN PRINTING COMPANY, 220 WEST JACKSON, CHICAGO

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STATEMENT OF THE CASE.

Petitioners seek to review a judgment (Tr. 62*) of the United States Circuit Court of Appeals for the Seventh Circuit, entered November 4, 1943, (rehearing denied No-

* Page references used herein when preceded by "Tr." indicate the pages of the record in this Cause, No. 575, October Term, 1943; when preceded by "R." indicate pages of the record on the former appeal, C. C. A. Nos. 7529 and 7537, filed herein in Cause No. 631, October Term, 1941; when preceded by volume number, as, for example, "Vol. I", refer to the record in Consolidated Causes, C. C. A. Nos. 7590, 7610-7617, filed herein in Cause Nos. 11-19, 32, October Term, 1942. The consideration of these additional records was authorized by the Circuit Court of Appeals (Tr. 52).

vember 24, 1943, Tr. 63) affirming an order of the United States District Court for the Northern District of Illinois, Eastern Division, entered June 8, 1943, (Tr. 28) in the pending reorganization proceeding under Section 77 of the Bankruptcy Act, of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor. The decision of the Circuit Court of Appeals is reported in 138 Fed. (2nd) 433. The decision of the District Court is not reported.

The order of the District Court (R. 28) overruled for the second time the objections of Petitioners herein to the report (R. 39) and order (R. 76) of the Interstate Commerce Commission of October 2, 1940, fixing maximum limits for allowances for fees and expenses incurred and compensation for services rendered in connection with the proceeding and plan therein and denied the fees and expenses requested by Petitioners.

This case has had a rather long history, has been before the District Court and the Circuit Court of Appeals on two different occasions and was the subject of a prior petition for certiorari addressed to this Court which was denied November 10, 1941. (314 U. S. 679) For a proper understanding of the case a chronological statement is desirable.

Petitioners represent the holders of Convertible Adjustment Mortgage Bonds of the Debtor in the principal amount of $31,500. (R. 14) Their petition for allowances was filed under Section 77 (c) (12) of the Bankruptcy Act pursuant to an order of the District Court dated April 26, 1940. (R. 10) They asked for an allowance of $12,500 for services and $436.80 for expenses. (R. 21) Their petition was referred to the Interstate Commerce Commission along with other similar petitions for the purpose of having determined a maximum limit pursuant to said Section. The Commission, on October 2, 1940, made its report which

contained the following with reference to the claim of Petitioners:

> "Shulman, Shulman & Abrams represent holders of $31,500 of Convertible Adjustment Mortgage Bonds, and performed services and incurred expenses from July 18, 1935. They intervened in the proceeding before the Court and the Commission, participated in hearings before the Commission on a plan of reorganization, filed exceptions to the report of the Examiner on a plan, and filed a petition for modification of the Commission's plan. They participated in the Court proceedings on the question of the appointment of Trustees, examined notices, motions, and petitions, and appeared in Court whenever necessary. They state that their efforts were primarily responsible for the abandonment of the first plan, and the abandonment of the proposal for a Voting Trust. We are not persuaded that the evidence supports such a statement. The firm submitted a statement showing the matters attended to on specific dates, but had no statement of time spent on the work. Its estimate of the time spent is 1,000 hours. We find that the services rendered were of no benefit to the estate." (R. 69)

The Commission's Order in which various maximum limits of allowances are listed provides:

> "(q) For services rendered and expenses incurred by Shulman, Shulman & Abrams, representing holders of the Debtor's bonds, nothing." (R. 79)

Petition for modification of this order was denied on November 5, 1940. (R. 116) The District Court, on November 13, 1940, made Findings of Fact and Conclusions of Law and entered its order making allowances to various claimants. (R. 117) On the same day the Court overruled Petitioners' objections to the report and order of the Commission. (R. 124) From that order Petitioners appealed to the Circuit Court of Appeals which affirmed the District Court on May 20, 1941. (*Abrams, et al.* v. *Scandrett*, 121 Fed. (2nd) 371) Petition for rehearing was

denied by the Circuit Court of Appeals on June 23, 1941. (R. 159)

Thereafter, petition for certiorari to review the decision of the Circuit Court of Appeals was filed in the Supreme Court of the United States and denied on November 10, 1941. (314 U. S. 679) This Court also denied a rehearing on December 8, 1941. (314 U. S. 714)

Thereafter, petition was filed by the Petitioners in the Circuit Court of Appeals for a rehearing which that Court denied on February 18, 1943, (Tr. 7) but, on reconsideration, on March 22, 1943, the Circuit Court of Appeals vacated its order of February 18, 1943, granted a rehearing, recalled its mandate which had been issued, reversed the Cause and remanded it to the District Court "with directions to examine the evidence and determine whether it supports the Commission's findings." (Tr. 7)

The basis of the last decision of the Circuit Court of Appeals, as stated in its opinion, was that it had misconstrued the statute in holding that the District Court was without jurisdiction to review the maximum limit fixed by the Commission and it concluded that in the light of the decision of the Supreme Court of the United States in *Reconstruction Finance Corporation* v. *Bankers Trust Company*, decided February 8, 1943, (318 U. S. 163) the District Court was in error in declining to examine the evidence and that it should examine it for the purpose of determining whether or not it supported the Commission's finding.

The case went back to the District Court and was argued and submitted by Counsel and taken under advisement by the Court. On June 8, 1943, the District Court filed its Findings and Conclusion, (Tr. 27) which are as follows:

"FINDINGS AND CONCLUSION.

In compliance with the direction contained in the order of the Circuit Court of Appeals (*Abrams, et al.*

v. *Scandrett, et al.*, 121 Fed. (2nd) 371, rehearing allowed March 22, 1943) 'to examine the evidence and determine whether it supports the commission's findings' complained of in that proceeding, I have examined the record of the Interstate Commerce Commission and have determined that there is substantial evidence to sustain the finding made in this matter as set forth in the report of the Interstate Commerce Commission of October 2, 1940, as follows:

'Shulman, Shulman & Abrams represent holders of $31,500 of Convertible Adjustment Mortgage Bonds, and performed services and incurred expenses from July 18, 1935. They intervened in the proceeding before the Court and the Commission, participated in hearings before the Commission on a plan of reorganization, filed exceptions to the report of the Examiner on a plan, and filed a petition for modification of the Commission's plan. They participated in the Court proceedings on the question of the appointment of Trustees, examined notices, motions, and petitions, and appeared in Court whenever necessary. They state that their efforts were primarily responsible for the abandonment of the first plan, and the abandonment of the proposal for a Voting Trust. We are not persuaded that the evidence supports such a statement. The firm submitted a statement showing the matters attended to on specific dates, but had no statement of time spent on the work. Its estimate of the time spent is 1,000 hours. We find that the services rendered were of no benefit to the estate.'

I therefore conclude that the objections of Shulman, Shulman & Abrams and the intervenors represented by them to the report of the Interstate Commerce Commission, disallowing their claim for fees and expenses, should be overruled and that the order of the commission of October 2, 1940 'for services rendered and expenses incurred by Shulman, Shulman & Abrams, representing holders of Debtor's bonds, nothing', should be sustained.

MICHAEL L. IGOE,
Judge, United States District Court."

On the same day the District Court entered an order again overruling the objections of Petitioners to the report of the Interstate Commerce Commission and sustaining the order of the Commission entered October 2, 1940. (Tr. 28) On June 16, 1943, Counsel for Petitioners filed a motion to vacate the Court's Findings and Conclusion and to adopt other Findings and Conclusions (Tr. 28) which motion was overruled on the 21st day of June, 1943. (Tr. 33)

An appeal was taken by the Petitioners from the order of the District Court entered June 8, 1943, overruling the objections to the report and order of the Commission, and from the order of June 21, 1943, denying the motion to vacate the Court's findings. (Tr. 34) The appeal was heard by the Circuit Court of Appeals which, on November 4, 1943, rendered its opinion (*Abrams, et al.*, v. *Scandrett*, 138 Fed. (2nd) 433—Tr. 56) and entered its judgment (Tr. 62) affirming the District Court. It is to review that judgment that the petition for certiorari has been filed.

SUMMARY OF ARGUMENT.

I.

No Proper Case Is Presented for Review by Certiorari.

Section 77 (c) (12), National Bankruptcy Act.

Reconstruction Finance Corporation v. *Bankers Trust Company*, 318 U. S. 163; 87 L. Ed. 481.

Rule 38, U. S. Supreme Court Rules.

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U. S. 251.

Magnum Import Co., Inc. v. *Coty*, 262 U. S. 159.

II.

There Is No Defect of Findings.

(a) Rule 52(a) has no application and if it had, its requirements were satisfied.

Rule 52(a) of the Rules of Civil Procedure.

Reconstruction Finance Corporation v. *Bankers Trust Company*, 318 U. S. 163; 87 L. Ed. 481.

Thomas v. *Peyser*, 118 Fed. (2nd) 369.

Rule 27 of the Circuit Court of Appeals of the Seventh Circuit.

Brown v. *Metropolitan Life Ins. Co.*, 100 Fed. (2nd) 98, 99.

Goodacre v. *Panagopoulos*, 110 Fed. (2nd) 716, 718.

National Savings and Trust Company v. *Shutack*, decided by U. S. Court of Appeals for District of Columbia on December 6, 1943.

III.

The Determination of the District Court, Sustained by the Circuit Court of Appeals, Is Supported by the Record.

Section 77-B, National Bankruptcy Act.

Chapter X, National Bankruptcy Act.

In Re Tower Building Corporation, 88 Fed. (2nd) 347, 349.

Steere v. *Baldwin Locomotive Works*, 98 Fed. (2nd) 889, 891.

In Re United Cigar Stores, 21 Fed. Supp. 869, 874.

In Re Consolidated Motor Parts, Inc., 85 Fed. (2nd) 579, 581.

In Re Porto Rican American Tobacco Co., 117 Fed. (2nd) 599, 601.

Warren v. *Palmer*, 132 Fed. (2nd) 665-669.

Section 77 (c) (12), National Bankruptcy Act.

Abrams v. *Scandrett*, 121 Fed. (2nd) 371.

Abrams v. *Scandrett*, 138 Fed. (2nd) 433.

Reconstruction Finance Corporation v. *Bankers Trust Company*, 318 U. S. 163; 87 L. Ed. 481.

IV.

The Commission Had Jurisdiction to Fix a Maximum Limit of "Nothing".

Section 77 (c) (12), National Bankruptcy Act; U. S. C. A. Sec. 205 (c) (12).

Rule XLIX, U. S. Supreme Court Rules in Bankruptcy.

Dickinson Industrial Site, Inc., v. *Cowan*, 309 U. S. 382, 388.

In Re Realty Associates Securities Corp., 69 Fed. (2nd) 41, 42.

In Re Paramount Publix Corp., 85 Fed. (2nd) 588, 590.

In Re New York, New Haven & Hartford R. R. Co., 46 Fed. Supp. 214.

ARGUMENT.

In support of their petition, the Petitioners advance several contentions which may be summarized as follows:

They claim that the report of the Commission, which fixed the maximum in their case at "nothing", was defective in that it lacked basic findings and they suggest that Rule 52(a) of the Rules of Civil Procedure for the District Courts of the United States applies to the report, and similarly they urge that the District Court was required to comply with Rule 52(a) and that it failed to do so and erroneously refused to adopt findings which were proposed in behalf of the Petitioners. It is likewise urged that there is no substantial evidence to support the finding of the Commission that the services rendered by Petitioners were of no value to the Estate. Finally, they urge that the Commission was without jurisdiction to fix a maximum of "nothing". The last two contentions were fully presented in the former petition for certiorari in this same case, filed in this Court in No. 631, October Term, 1941, and denied. Reference to the brief of Petitioners in support of the petition filed at that time will disclose that both of these questions were argued at some length. The same record, so far as evidence is concerned, was presented to this Court then as now and the Court must have concluded that the points were not well taken. As to the matter of findings, insofar as the argument concerns findings made by the Commission, the matter is presented for the first time in the petition for certiorari and its impropriety is suggested. In any event, definite finding of the ultimate and material fact that Petitioners' services were of no benefit to the Estate was made and both the District Court and the Circuit Court of Appeals have held that it was supported by substantial evidence.

All of these questions will be presented briefly in the argument which follows, but, first of all, from the mere statement of the contentions made in behalf of the Petitioners it is submitted that

I.

No Proper Case Is Presented for Review by Certiorari.

It goes without saying that Petitioners are not entitled to review as a matter of right. What we conceive to be their principal contentions are the alleged insufficiency of the evidence to support the Commission's determination of the maximum limit of "nothing" and the alleged lack of jurisdiction of the Commission to fix such a limit.

The action of the Commission has been approved by two reviewing courts and both contentions have been embodied in a previous petition filed in this Court. No question of public importance is presented and it does not appear that the decision of the Circuit Court of Appeals, which Petitioners seek to review, is in conflict with the decision of any other Circuit Court of Appeals. While the claim of Petitioners involves the construction of a federal statute there appears to be no dispute in the authorities as to the proper interpretation. Moreover, this Court, by its own decision, has determined the proper application and interpretation of Section 77 (c) (12) of the Bankruptcy Act under which Petitioners' claim was presented.

Reconstruction Finance Corporation v. *Bankers Trust Company*, 318 U. S. 163; 87 L. Ed., 481.

Certainly there is no departure shown from the accepted and usual course of judicial proceedings.

It is submitted that Petitioners have not brought themselves within the requirements of Rule 38 of this Court. As this Court has many times pointed out, jurisdiction to

review decisions of inferior courts by certiorari is one which is to be exercised sparingly and only in cases of general importance or in order to secure uniformity of decisions. Such jurisdiction should not be exercised merely to give the defeated party another chance.

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U. S. 251.

Magnum Import Co., Inc., v. *Coty*, 262 U. S. 159.

Under the rule and decisions of this Court it is believed that it is apparent from the face of the petition that no case for certiorari is made. However, we shall briefly answer the arguments advanced.

II.

There Is No Defect of Findings.

For the first time Petitioners urge the contention that the Commission's report fixing maximum limits does not contain sufficient findings. The purpose of findings, as set forth in the authorities referred to in the brief supporting the petition, is to make clear the reason for the decision and thus insure against arbitrary action and, at the same time, advise any reviewing authority of the basis of the action taken.

In this case the Commission made a complete report (R. 39) in which it set forth in detail the services rendered and expenses incurred by all claimants, analyzed the work performed and in the order fixed the maximum limit of the allowance to be made in each instance. We have quoted in the Statement of the Case the portions of the report and order relating to the services rendered by Petitioners and it will be noted that the report contains a definite finding by the Commission that the services rendered were of no benefit to the Estate.

Counsel makes some point of the proposition that no specific reference is made to expenses but the expenses claimed were incurred in connection with the rendition of the services and, obviously, if the services were of no benefit, there was no justification for the allowance of the expenses incurred in connection therewith. Both must stand or fall together.

Certainly, the Commission's report could leave no doubt in the mind of even the casual reader as to the basis for the Commission's decision.

(*a*) *Rule* 52(*a*) *has no application and if it had, its requirements were satisfied.*

It is even suggested that Rule 52(a) of the Rules of Civil Procedure should apply to Commission findings. It would seem that the simple answer to that suggestion is that the first of those rules provides that they shall govern the procedure in the District Courts of the United States in all suits of a civil nature at law or in equity with certain stated exceptions. Certainly, proceedings before the Interstate Commerce Commission do not fall within the purview of the rule.

Petitioners also contend that under Rule 52(a) the District Court was required to make findings of fact and conclusions of law and that the action of the Court did not comply with the requirements of that rule.

Rule 52(a) provides that "in all actions tried upon the facts without a jury the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. * * *"

Obviously, the kind of case covered by the rule is the ordinary case which involves the trial of issues of fact by the court sitting without a jury. This case does not fall within that category. Here, the District Court did not

undertake to determine the question of how much or how little should be allowed to a claimant. The scope of its inquiry was limited by the direction of the Circuit Court of Appeals, as set forth in its mandate, to examine the evidence and determine whether or not it supported the Commission's findings. (Tr. 8) The Court tried no issue but, on the contrary, reviewed the action of the Commission in fixing a maximum of "nothing". The Court had no authority to fix a maximum or to change one which had been fixed. The limit of the Court's authority is set forth in *Reconstruction Finance Corporation* v. *Bankers Trust Company*, 318 U. S., 163; 87 L. Ed. 481, which decision undoubtedly led the Circuit Court of Appeals to reverse its former decision.

This Court, in that case, says:

> "We think the Congress did not intend to deny the courts all power of review of Commission action in such cases. The statute plainly requires reference to the Commission of claims of the class under consideration, a hearing by that body, the setting of a maximum and action by the court on the footing of the Commission's report. It does not contemplate a hearing *de novo* on the issue of the reasonable worth of the services rendered or the propriety of the expenses incurred, or a reappraisal by the court of the facts. Moreover the procedure suggested by petitioner does not comport with the evident purpose of Section 77 (c) (12) which appears to treat the court's action with respect to such claims as a matter distinct from his final action on the plan as a whole under Section 77(e).
>
> Our conclusion is that the function committed by the law to the Commission is the ordinary one reposed in a fact finding body and that its findings, supported by evidence, may not be disturbed by a court. This construction of the Act leaves the court free to decide upon the basis of the Commission's report all questions of law. With respect to the amount set as a

> maximum the only question of law which can arise is whether there is substantial evidence to support the Commission's finding. If there is not the court may so hold, set aside the finding and return the matter to the Commission."

Under the rule thus announced the only question the District Court undertook to decide was a question of law and the case, therefore, did not present a trial upon the facts. The Court of Appeals for the District of Columbia, in *Thomas* v. *Peyser*, 118 Fed. (2nd) 369, reached a similar conclusion in a case where the decision was rendered as a result of a motion to dismiss, the Court holding that Rule 52(a) applied only to actions tried upon the facts and does not apply where the only issues determined are issues of law.

If Rule 52(a) had any application in this case, then the Court did everything that reasonably could be done to comply with the rule. It was limited in its action by the mandate of the Circuit Court of Appeals to the determination of one question. The District Court complied strictly with the mandate of the Circuit Court of Appeals. It was not authorized *de novo* to go into the question of reasonable worth of the services or the propriety of the expenses incurred. The question propounded to it was answered simply, briefly and clearly. Had the District Court attempted to go into matters of evidence, it would have violated Rule 27 of the Circuit Court of Appeals of the Seventh Circuit which reads:

> "27. *Findings of Fact.* Findings of fact, made by the district court and included in the record on appeal pursuant to the authority expressed in Rules 52(a) and 75(g) of the Federal Rules of Civil Procedure, shall cover only material issues, excluding evidentiary issues as well as argumentative findings."

The principal purpose of any rule requiring findings

is to enable the reviewing court to ascertain the basis for the decision of the court below.

Brown v. *Metropolitan Life Ins. Co.*, 100 Fed. (2nd) 98, 99.

Goodacre v. *Panagopoulos*, 110 Fed. (2nd) 716, 718.

In the *Brown case* the Court says:

> "We held in *Shellman* v. *Shellman*, 68 App. D. C. 197, 95 F. 2d 108, decided January 10, 1938, that the purpose of the findings contemplated under Equity Rule 70½ of the Supreme Court, 28 U. S. C. A. following Section 723, is to enable this court to ascertain the basis for the determination below, and where this court can readily understand the questions presented precise findings are not absolutely essential. While Equity Rule 70½ requires findings of fact by the district judge, in the case at bar we are able to know the basis of the determination by the lower court, and, as in the *Shellman Case, supra*, we will decide this case, even though the proper findings of fact were not made."

The Court was there considering Equity Rule 70½ which is the predecessor of Rule 52(a) and the rule of the case was applied in the *Goodacre case*, which arose under Rule 52(a). The findings and conclusion of the Court in this case clearly comply with the requirements of the rule as thus announced.

We find nothing in the case of *National Savings and Trust Company* v. *Shutack*, decided by the United States Court of Appeals for the District of Columbia on December 6, 1943, and cited by Petitioners, which is contrary to the construction of the rule adopted by the Circuit Court of Appeals. In that case the court denied a petition for instructions without making any findings and the Appellate Court stated that it was impossible to determine why the court acted as it did. No

such situation exists in this case, either as to the proceeding involved or the action taken.

It is, therefore, respectfully submitted that the District Court was not required to comply with Rule 52(a) but in fact did comply therewith in that it passed definitely upon the one question that was submitted to it and fully advised the Circuit Court of Appeals as to the basis for its conclusion.

III.

The Determination of the District Court, Sustained by the Circuit Court of Appeals, Is Supported by the Record.

Both the District Court and the Circuit Court of Appeals have held that the finding of the Commission that the services rendered by Petitioners were of no value to the Estate was supported by substantial evidence.

Counsel argues that it is not disputed that they performed certain services and incurred certain expenses and that, therefore, the are entitled to some compensation. Apparently, it is the view of Counsel that if a party is allowed to intervene and does some work, he should receive something, regardless of whether or not the work contributed in any way to the Plan of Reorganization or was in any way beneficial to the Trust Estate. Such is not the rule and if it were it would authorize compensation to anyone who was active enough to bring about intervention, attend hearings and do some work in connection therewith.

Most of the cases involving compensation which have come to the Appellate Courts are cases which have arisen in connection with the bankruptcy of corporations other than railroads. There are many of such cases which have arisen under Section 77-B or Chapter X proceedings. The following cases illustrate the true rule to be followed in

determining whether or not services are compensable from the funds of the Trust Estate:

In Re Tower Building Corporation, 88 Fed. (2nd) 347, 349.

Steere v. *Baldwin Locomotive Works,* 98 Fed. (2nd) 889, 891.

In Re United Cigar Stores, 21 Fed. Supp. 869, 874.

In Re Consolidated Motor Parts, Inc., 85 Fed. (2nd) 579, 581.

In Re Porto Rican American Tobacco Co., 117 Fed. (2nd) 599.

In the *Tower Building case,* in discussing the matter of allowance by the District Court in a Section 77-B proceeding, the Court said:—

> "The Court, under the statute, must determine, if any services have been rendered which have been of benefit to the estate, which have contributed to the promotion of the purposes of the legislation, the promulgation and adoption of a feasible plan of reorganization."

In the *Baldwin Locomotive case,* the Court said:

> "It is equally well settled that compensation may not be allowed under the act to anyone for services which have not contributed directly and materially to the successful accomplishment of the debtor's reorganization. *In re National Lock Co.,* 7 Cir., 82 F. 2d 600; *Teasdale* v. *Sefton Nat. Fibre Can Co.,* 8 Cir., 85 F. 2d 379, 107 A. L. R. 531; *Straus* v. *Baker Co.,* 5 Cir., 87 F. 2d 401; *Birrell* v. *Great Lakes Utilities Corporation,* 3 Cir., 96 F. 2d 767."

The Circuit Court of Appeals of the Second Circuit, in the *Porto Rican case,* aptly stated that "it cannot be supposed that in all such cases the Estate is to pay for unnecessary services." (117 Fed. (2nd), 601.)

It has been contended that the rule announced by these cases does not apply in a Section 77 proceeding but that

contention was set at rest by the Circuit Court of Appeals of the Second Circuit in the case of

Warren v. *Palmer,* 132 Fed. (2nd) 665,

which arose in a Section 77 proceeding and involved the construction of Section 77 (c) (12) relating to allowances. The case squarely holds that the rule of Section 77-B applies, that to be compensable the service must be of benefit to the Estate or contribute in some substantial manner to the proceedings or the plan. The following extracts from the opinion of the Court are enlightening:

> "Although judicial interpretation of Section 77, sub. c (12), is conspicuously absent, it is so akin, both in its terms and in its context, to a provision applicable—before the recent amendments—in reorganization proceedings, Section 77-B, sub. c (9), that cases decided under the latter statute may be adopted as ruling analogies." (132 Fed. (2nd) 667, 668.)
>
> * * * * *
>
> "The criterion of reasonableness under Section 77-B, sub. c (9), was *benefit* to the estate under administration or contribution in some substantial manner to the 'working out' of a plan of reorganization. (Citing cases.) Differently stated, the services or expenses for which compensation or reimbursement was sought must have been of benefit to all the sets of interests in the estate. Activities which only increased the share of one class of creditors at the expense of other creditors have not been considered to benefit the estate or to contribute to the plan." (Citing cases.) (132 Fed. (2nd) 668.)
>
> * * * * *
>
> "Petitioners also assert that they were required to keep in constant touch with the various plans proposed because of their interests and claim reimbursement for those activities. But this court has declared that 'mere participation in the hearings * * * or offering advice, suggestions or criticisms regarding the proposed plan, or on matters of procedure, does not give rise to any claim for compensation from the estate.'" (132 Fed. (2nd) 669.)

The Circuit Court of Appeals took the same view in its first decision in this case—

Abrams v. *Scandrett,* 121 Fed. (2nd) 371,

and it is apparent from its last opinion that it still entertains that view. (Tr. 60.—138 Fed. (2nd) 433)

In considering the evidence it must be remembered that the Petitioners here were the claimants and the burden was upon them to show that they rendered services which were beneficial to the Estate and contributed to the Plan of Reorganization. It could hardly be expected that the record would disclose direct testimony from a witness to the effect that what the Petitioners did was of no benefit and that is the type of evidence that Petitioners seem to think should appear in order to support the finding of the Commission. What the record does show, and shows with clarity, is that the class of bondholders in which the Petitioners belong was represented by other parties to the proceeding, and particularly by the Trustee under the mortgage, and that such changes as were made in the Plan were made either by the representatives of the Debtor, who proposed the initial Plan, or at the instance of other parties than the Petitioners.

We shall not burden the Court by discussing the voluminous record of the proceeding in detail, but will refer briefly to the particular contributions claimed by Petitioners.

They contend that their objection to the Debtor's Plan of 1935 caused its abandonment and the elimination of many features contained therein. It is admitted that this Debtor's Plan was a standby plan. It is briefly summarized in the report of the Commission appearing in Volume V at page 2182, *et seq.* On page 2183 it is pointed out that certain old bond issues were under that Plan to remain undisturbed as to lien and maturity and the payment of

interest on both groups of bonds was to be made contingent upon earnings being fully cumulative. The first hearings upon this Plan were had in 1935 but no plan was adopted and at a subsequent hearing before the Commission on June 16, 1937, at which hearing the Petitioners were not represented, (R. 26) the Debtor announced that it was unable to recommend consummation of the 1935 Plan. Considerable testimony was introduced upon this Plan. At Volume II, page 550, extensive railway statistics and studies in the form of exhibits and otherwise were introduced which were in part designed to bring down to date earlier studies and exhibits and after that was done it was shown, at page 587, that it was recognized that at the time the 1935 Plan was proposed one possible defect therein was the cumulative interest feature of certain mortgage bonds the seriousness of which could be determined only by future developments; that since that time a Committee had been appointed to study the Plan; that the railroad situation was clouded with more uncertainty than was apparent in 1935 and that the Committee concluded that those uncertainties made it inadvisable to recommend the adoption of that Plan. A witness was called in behalf of the Debtor (Volume II, page 600) who advanced the suggestion that a limited cumulative feature could probbably be devised which would be adequate to protect the bondholder and at the same time prevent the accumulations reaching a point where they would materially distort the capitalization. The view so expressed was evidently approved by the Committee representing the Group of Institutional Investors since that Committee, on January 10, 1938, (Volume II, page 695) presented a Plan of Reorganization which was the basic Plan from which the Plan ultimately approved by the Commission was worked out. That Plan contains a provision under which none of the old bonds would continue after reorganization but new

bonds would be issued, the income bonds bearing interest cumulative up to a total of 13½%. (Volume V, page 2193) The Plan that was ultimately adopted contains this provision. (Volume III, page 1327)

It is clear, therefore, that this matter of cumulative interest was one that was considered from the beginning, not only by the Debtor but by the Institutional Investors and Savings Bank Groups who formulated the ground work for the ultimate Plan. There is nothing to indicate that Petitioners in any way assisted or cooperated with those Groups in the formulation of any Plan.

The studies referred to in the opinion of the Circuit Court of Appeals included the statistics and exhibits above referred to no part of which was furnished by the Petitioners. These studies were part of the record and they, together with the testimony, a portion of which has been called to the Court's attention, amply support the Commission's conclusion that the credit for such action as was taken with reference to cumulative interest was due to others than the Petitioners.

The same situation exists with reference to the provision as to the Voting Trust. The record shows that the Voting Trust was originally proposed by the Institutional Investors Group. The Commission's own report makes this clear. (Volume V, page 2195) That report also shows that the Debtor objected to the Voting Trust. (Volume V, page 2204) It was likewise objected to by the Trustees of the Adjustment Mortgage, (Volume V, page 2209) but was finally approved in the Commission's report and order. (Volume III, page 1344)

It is claimed that certain objectionable features in the Plan proposed by the Institutional Investors, filed early in 1938, were eliminated by virtue of Petitioners' efforts. The record does not bear this out but shows, on the con-

trary, that such changes as were made in that Plan were in the main those suggested by Counsel for the Debtor. (Volume V, pages 2200-2206)

There is no evidence supporting the contention that Counsel for Petitioners were responsible for the determination by the Commission of the rate of interest on the Series "B" Bonds. On the contrary, the record shows that the interest rate of 4½% on these bonds was in fact recommended in the Debtor's modifications as shown in Exhibit 189, page 7, before the Commission. (Volume II, page 951)

Reference is made to the treatment of free assets of the corporation. Upon this point the Commission, in its report, (Volume V, page 2174) states that the Debtor has no free assets of substantial value except the stock of the Milwaukee Land Company. At the time of all of the hearings before the Commission that stock was pledged and was not free and was in fact released in June, 1938, (Volume V, page 2173) whereas the final hearings before the Commission were concluded on March 22, 1938. The Commission's information as to the free character of the Milwaukee Land Company stock must, therefore, have been obtained from the Annual Reports and other Reports filed with the Commission by the Trustees in the ordinary course. It is obvious that Petitioners accomplished nothing by way of securing allowance for free assets which were not free until after the hearings were closed.

In order that the Court may be advised as to other Groups composed of substantial holders of Adjustment Bonds who were represented in this proceeding it should be stated that the Institutional Investors Group held $9,757,600 of these bonds. (Volume I, page 536) Thomas Wolstenholme Sons & Company represented certain other owners of Adjustment Bonds and intervened in the pro-

ceeding before the Commission at the first hearing. (Volume V, page 2157) The National City Bank of New York and William W. Hoffman, as Trustees under the Adjustment Mortgage and representing all of the Adjustment Mortgage bondholders, intervened before the Commission on June 16, 1937, and participated in the proceedings thereafter. (Volume II, page 549)

The Debtor's Plan provided that Adjustment Bonds would receive preferred stock on the basis of $1,000, par value, for each $1,000 of bonds. (Volume V, page 2184) The Plan proposed by the Institutional Investors provided for one share of no par common stock for each $100 of claim of Adjustment Bonds for principal and interest. The Plan finally adopted by the Commission provides substantially this treatment without providing for full compensation for the interest. It is clear, therefore, that the treatment accorded the Adjustment Bonds proceeded on a descending curve from the time of the first Plan forward. The Commission, which was in a better position than anyone else to know who had contributed to the Plan, undoubtedly concluded that those things which were done which contributed to the Plan or which benefited the Trust Estate were done by others and not by the Petitioners or their Counsel. It is submitted that the record amply supports that conclusion.

Incidentally, Counsel complains bitterly that the Court below emphasized the fact that the Commission was the best judge of who performed services resulting in benefit to the Estate and asserts that the Court erroneously substituted this assumed knowledge of the Commission for substantial evidence. The Court did no such thing, but it did quite properly refer to the fact that the Commission, which formulated the Plan, was in a better position than anyone else to know who contributed to it. Upon that point

it appears that this Court has expressed the same view as that expressed by the Circuit Court of Appeals. In

Reconstruction Finance Corporation v. *Bankers Trust Company*, 318 U. S. 163; 87 L. Ed., 481,

this Court said:

> "Indeed, since most of the services are performed in connection with its activities, it is probably in a better position to judge of their value to the reorganization than any court or other fact finding instrumentality."

The Petitioners devote a great deal of time to the argument that the District Court should have adopted the findings proposed by them. The question involved here is not whether or not some evidence could have been found in the record to support some or all of the findings proposed but it is rather whether or not the evidence supported the finding that was made by the Commission. It would, therefore, seem that this portion of the argument advanced is not relevant to the question involved.

IV.

The Commission Had Jurisdiction to Fix a Maximum Limit of "Nothing".

Petitioners urge that under the statute the Commission was without jurisdiction to fix a maximum limit of "nothing"; that its power was limited to the fixing "of a ceiling within which limits the Court might allow reasonable compensation." It is our position that this contention is wholly without merit. The right to an allowance out of the estate of a railroad in process of reorganization under Section 77 is provided by Section 77 (c) (12) of the Bankruptcy Act. U. S. C. A. Sec. 205 (c) (12). That section provides that any allowances made by the Court must be within maximum limits fixed by the Commission. Rule XLIX of the Rules in Bankruptcy of this Court requires that all applications for allowances shall be submitted to

the Interstate Commerce Commission, which shall determine the maximum limits of such allowances. This Court, in

> *Dickinson Industrial Site, Inc.*, v. *Cowan*, 309 U. S. 382, 388,

has pointed out that the purpose of reorganization statutes in thus regulating allowances to be made from the trust estate was to place such allowances under more effective control. To that end, the fixing of a maximum was entrusted to the Commission, a body skilled in matters affecting railroads and railroad reorganizations and well qualified to pass upon the value of the services rendered in connection therewith.

The right to any allowance out of a bankrupt estate for services rendered in connection with reorganization proceedings and plans did not exist in the absence of statute. This is true generally as to allowances in bankruptcy proceedings.

> *In Re Realty Associates Securities Corp.*, 69 Fed. (2nd) 41, 42.
>
> *In Re Paramount Publix Corp.*, 85 Fed. (2nd) 588, 590.

In the *Paramount case* the Court said:

> "Both in proceedings in equity and in bankruptcy simpliciter it is the ordinary rule that attorneys representing creditors, security holders, or stockholders must look for compensation to their clients rather than to the general estate. *In re New York Investors* (C. C. A.), 79 F. (2d) 182, 186, certiorari denied; *Endelman* v. *R. F. C.*, 296 U. S. 649, 56 S. Ct. 308, 80 L. Ed. 462; *In re Realty Associates Securities Corp.* (C. C. A.), 69 F. (2d) 41, certiorari denied; *Bondholders' Committee* v. *Realty Associates Securities Corp.*, 292 U. S. 628, 54 S. Ct. 631, 78 L. Ed. 1482."

When Section 77 was enacted, the right to allowances was one which Congress could give or withhold. The statute might well have provided that no such allowances

should be made. If that is so, it would seem to follow that Congress could place a limitation upon allowances or could attach conditions thereto. Congress, by Section 77 (c) (12), gave to the Commission express authority to fix maximum limits:

> "* * * The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the Court pursuant to the provisions of paragraph (12) of this subsection (c) * * *."

The validity or propriety of this provision is no longer in doubt and, since it is likewise established that allowances can be made only to those who have made some contribution, it would seem clear that the Commission is authorized to fix maximum limits in all cases and that this power carries with it the right to fix a maximum of "nothing" if the Commission, in the exercise of its judgment, concludes that the services rendered are of no value. Of course, there must be support in the record for the maximum that is fixed, but, so far as the point here under consideration is concerned, the Petitioners' contention would lead to the conclusion that if the Commission fixed a maximum limit of $10, it would be acting within its jurisdiction, whereas if it fixed a maximum of "nothing", it would be acting beyond its jurisdiction. Such a conclusion finds no support in the authorities and is directly contrary to the clear provisions of the statute and the judicial interpretations thereof.

This is not at all an unusual case. There have been many instances where a maximum limit of "nothing" was fixed. In this very proceeding maximum limits of "nothing" were fixed for certain other claimants. (R. 76-79) In

In Re New York, New Haven & Hartford R. R. Co., 46 Fed. Supp. 214,

upon which Petitioners rely, it will be observed that in several instances maximum limits of "nothing" were

fixed and approved by the trial court. (page 236) To conclude that the Commission cannot fix a maximum of "nothing" would require the Court to read into the statute a requirement that in all cases where a claim is made a maximum limit in some definite amount must be fixed and this though the Commission concludes that the claimant rendered no services whatsoever. This would be legislation and would be clearly contrary to the intention of Congress as announced in Section 77 (c) (12).

Conclusion.

We have tried to answer briefly the arguments advanced in behalf of the Petitioners.

We submit that these Petitioners have had more opportunity than is usually accorded litigants to present their cause. They have been before the District Court and the Circuit Court of Appeals on two occasions and this is the second presentation to this Court of the same case. We further submit that the record fully supports the conclusion reached by the Circuit Court of Appeals and by the District Court; that no showing has been made to entitle Petitioners to a further consideration by this Court and that the petition for certiorari should be denied.

Respectfully submitted,

A. N. WHITLOCK,
Counsel for Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Respondents,
888 Union Station,
Chicago, 6, Illinois.

Dated January 18, 1944.